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No. 80-221

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, ET AL.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND
CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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TABLE OF AUTHORITIES

Page

Case:

United States v. *Nobles*, 422 U.S. 225 3

Statute and rules:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 1

42 U.S.C. 2000e-5(f)(5) 2

Fed. R. Civ. P.:

Rule 19(a)(2) 2

Rule 53 2

Miscellaneous:

"Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining," BNA Daily Lab. Rep. No. 65 (Apr. 2, 1980) 4

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Petitioners contend that the district court abused its discretion in requiring them to pay $833 as their proportionate share of the compensation for the special master.

1. In October 1975, respondent Equal Employment Opportunity Commission commenced this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The Commission charged that respondent Chrysler Corporation had discriminated against women at its facilities in Dayton, Ohio, with respect to hiring,

assignments, promotions, transfers, layoffs, and disability benefits. Petitioners, as the collective bargaining representative, were named as defendants pursuant to Fed. R. Civ. P. 19(a)(2) because of their interest in the outcome of the litigation. Although petitioners unsuccessfully sought to be formally realigned as parties plaintiff, they actively participated in the case in support of the Commission and filed a cross-claim against Chrysler (Pet. 3-5; Pet. App. 2a, 6a; Chrysler Br. in Opp. 2-3).

Pursuant to Fed. R. Civ. P. 53 and 42 U.S.C. 2000e-5(f)(5), the district court referred the case to a special master in August 1976 (Pet. App. 10a-11a). The order of referral provided (*id.* at 11a):

> The parties will pay a reasonable compensation and expenses to such Master. In the event the parties and the Master are unable to agree upon such sum, the Court will fix compensation and expenses and charge it to such of the parties as the Court may determine.

Petitioners did not oppose this referral to the master (*id.* at 2a).

In December 1977, the EEOC and Chrysler entered into a settlement agreement (Pet. App. 12a-24a). While Chrysler did not concede liability, it agreed to increase the percentage of female employees in its workforce and to conduct in a non-discriminatory manner its practices regarding hiring, job assignments, promotions, transfers, layoffs, and recalls. The agreement further provided that it did "not require Chrysler to violate any provisions of any current collective bargaining agreement between it and [petitioners]" (*id.* at 15a). Finally, the agreement stated that "[e]ach party agrees to bear its own costs and fees expended in the litigation of the instant action" (*id.* at

23a). Although petitioners were not parties to this agreement or privy to its negotiation, they joined in the motion to dismiss the case on the basis of the settlement agreement, which the district court granted (Pet. 8).

In May 1978, the district court approved a $2500 fee for the special master and ordered that each party—the Commission, Chrysler, and petitioners—pay one-third of that amount (Pet. App. 5a-7a). With respect to petitioners, the court concluded that it "ha[d] no means of knowing the extent of this defendant's participation before the Master but it appears that the participation in terms of pleadings before this Court was significant" (*id.* at 7a).

Petitioners appealed from this determination, contending that it should not be assessed any portion of the $2500 fee because "mere participation in the action did not justify assigning liability for costs" (Pet. App. 2a). Noting the district court's determination that petitioners "took an active part in the litigation" (*id.* at 3a), the court of appeals held that the district court had not "abused its discretion in assessing the $833.33 fee against [petitioners]" (*id.* at 4a), and it therefore affirmed the imposition of fees.

2. Petitioners recognize that the question they present is "novel" (Pet. 11) and "has not previously been decided" (*id.* at 12). Especially in these circumstances, the fact-bound issue whether the district court abused its discretion in apportioning fees does not warrant further review by this Court. See, *e.g.*, *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).

It may be appropriate, however, for the Court to vacate the judgment below and remand the case to the lower courts for further proceedings. Subsequent to the filing of

the EEOC's brief in the court of appeals in October 1978, the Commission has addressed itself to the important need under Title VII to promote voluntary compliance by unions and employers. To this end, the Commission has recently adopted a "Resolution to Encourage Voluntary Affirmative Action in Collective Bargaining." See BNA Daily Lab. Rep. No. 65, at D-2 (Apr. 2, 1980). As explained in the accompanying background paper, the Commission will seek to exercise its prosecutorial discretion in tion in this area in order to "spur unions and employers to undertake initiatives voluntarily towards eliminating discriminatory employment practices" (*id.* at D-1) and to allow the Commission to "take advantage, where feasible, of union (or employer) efforts and resources in pursuing Title VII claims" (*id.* at D-2; emphasis omitted).

Petitioners' efforts to align themselves with the Commission and actively to oppose Chrysler in this action are among the kind of "concerted, aggressive" activities to which the Resolution is directed (see Resolution, at D-1). The Commission believes that its policy of encouraging active efforts to enforce Title VII has a bearing on whether parties such as petitioners should be compelled to pay a part of the costs in cases such as this and that the district court, in exercising its authority to apportion fees, would benefit from an opportunity to consider the Commission's informed judgment regarding voluntary compliance efforts under Title VII.

Because the Resolution was adopted by the Commission subsequent to the filing of its brief in the court of appeals (and its substance was not reflected in the position taken by the Commission), the courts below did not have the opportunity to consider this factor in reaching their decision. In these circumstances, the Court may deem it appropriate for the lower courts to recon-

sider the issue in light of this changed circumstance, and we would not oppose such a remand.

Respectfully submitted.

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